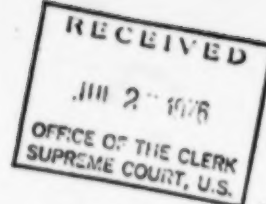


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No. 75-6657



IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

ANGELO BARTEMIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Reply by Petitioner, Angelo Bartemio to the
MEMORANDUM OF THE UNITED STATES IN OPPOSITION
to this Petition for Certiorari

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I

The Solicitor General opposes review of this Petition for Certiorari. However in an unrelated Petition for Certiorari (Abney -v- U.S., # 75-6521- 3rd Cir., ___ F2d ___, 1976) 1. / the Solicitor General requests that this Court review and decide ^{same} the/single question as proffered IN THIS PETITION, to wit:

"Whether in a federal criminal prosecution an appeal will lie from a pretrial denial of a motion to dismiss an indictment which is based upon, inter alia, grounds of double jeopardy?

II

The Bartemio Petition for Certiorari presents the question the Solicitor General desires answered by this Court in Abney, ante. Yet, the party seeking the answer from this Court eschews the suggestion that this case be heard. The Solicitor General

1 / Cert. Granted June 14, 1976(___ U.S. ___, 1976; 96 S.CT. 2646.

suggests in his Memorandum in opposition that:

- (a) Bartemio's double jeopardy claim is not even colorable;
- (b) that Bartemio's conviction was set aside at his (Bartemio's) own behest;
- (c) That if Bartemio is once more convicted he would then have an opportunity to present his arguments, including the double jeopardy argument, to the court of appeals 2/.

III

The Solicitor General's reasoning escapes this Petitioner. The question proffered is simple and direct. The simple answer is why should Bartemio have to suffer the agonies for which the Double Jeopardy Clause of the Fifth Amendment provides protection. Recently, this Court in United States -v- Dinitz, ___ U.S. ___, 96 S.Ct 1075, 9 (1976) while reversing a decision which had granted Dinitz relief (under entirely dissimilar circumstances) 3/reviewed the purpose of the Double Jeopardy clause, stating:

Underlying this constitutional safeguard is the belief that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199, (Dinitz, 96 S.Ct @ 1079)

IV

The conviction in Abney, ante (#75-6521) was reversed and a new trial granted (Just as Bartemio). Unlike Bartemio's case the Government had not confessed error in Abney. Bartemio SOUGHT OUTRIGHT REVERSAL OF HIS CONVICTION BASED ON GOVERNMENT SUPPRESSION OF EVIDENCE (indeed, the reason for the Government confessing error on Bartemio's second appeal and after denial of his first Petition for Cert., 419 U.S. 994) 4/.

2/ Solicitor's Mem. Opp. pp2

3/ Dinitz' retained counsel caused the "mistrial" dilemma. Neither in ABNEY or BARTEMIO is a mistrial question presented.

4/ The Government agreed evidence was suppressed which could have made a difference in the outcome of Bartemio's trial, but claimed the suppression was negligent and/or inadvertent. This concession came in the Court of Appeals after an unsuccessful S2255. The Government urged that Bartemio be granted a new trial; Bartemio urged outright reversal.

V

Both in Abney and Bartemio following reversals in the Court of Appeals each moved that their indictments be dismissed on grounds of double jeopardy. In each case both the District Court and the Court of Appeals denied relief. In Bartemio the Court of Appeals for the Seventh Circuit declined to grant the jurisdictional question of review. In Abney the Court of Appeals for the Third Circuit reviewed the case but declined relief (the Third Circuit followed their earlier opinions in deciding they had jurisdiction to review the denial of pretrial relief, Cf., United States v. DiSilvio, 520 F.2d 247 (3rd Cir., 1975).

VI

An issue proffered, as part and parcel, of our double jeopardy claim is that in the case at bar prosecutorial overreaching may have sufficiently prejudiced Bartemio so that the double jeopardy clause, indeed, bars further prosecution. This Court has not squarely addressed that aspect of double jeopardy. In dicta, however, this Court has suggested that the double jeopardy clause may well bar reprosecution where prosecutorial overreaching compel the request for a mistrial. In U.S. v. Dinitz, ___ U.S. ___, 96 S.Ct. 1075 (1976) inter alia, this court stated:

"But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." (96 S.Ct. at 1080)

In U.S. v. Tateo, 377 U.S. 463 (1964) the court, while reversing the dismissal of an indictment and re-instating the same for trial stated:

"If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain." (377 U.S. at 467, ft.nt. 3)

In United States v. Jorn, 400 U.S. 470 (1971) this Court, while barring retrial after the trial court, on its own motion declared a mistrial stated:

"Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf., United States v. Tateo, supra, at 468 N. 3, 84 S.Ct., at 1590; n. 11, supra." (400 U.S. at 486, ft.nt. 12)

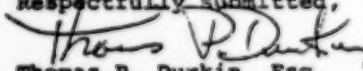
In the case at bar the "suppression of evidence" was prosecutorial overreaching, to be sure. No mistrial could have been declared because the evidence suppressed at trial surfaced over one (1) year after trial. We deem the expressions by this Court in Dinitz, Tateo and Jorn to be apropos and worthy of realistic consideration while reviewing the 5th Amendment double jeopardy prohibition. There can be no question but that the Government suppression was a factor in Bartemio's jury trial. The Government so conceded while confessing error and seeking that Bartemio be granted a new trial (513 F.2d 634; 7th Cir., 1975).

Recently, in U.S. v. Wilson, 534 F.2d 76 (6th Cir., 1976) the court reversed an order of the District Court dismissing an indictment on double jeopardy grounds (id at 82). However, the court in Wilson directed that upon remand the District Court give full consideration to Wilson's claim that his original mistrial was provoked by prosecutorial overreaching. Wilson appears to be the first case which recognizes the decisions from this Court as standing for the proposition that retrial may well be barred if the first trial was in any way aborted because of prosecutorial misconduct (Cf., 534 F.2d at 78-80).

VII

CONCLUSION

Bartemio respectfully urges that this Court grant his Petition for Certiorari (filed in Forma Pauperis) and thereafter reverse the order and judgment of the Court of Appeals for the Seventh Circuit and remand the case to that Court with directions^{5/} that the DOUBLE JEOPARDY QUESTION be fully reviewed and decided.

Respectfully submitted,

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^{5/} Delay in the prosecution of this indictment is (was) of no moment to the Government. Once they elected to retry Bartemio they were without objection to the prosecution of this appeal. In addition, a co-indictee, John J. Brennan, has yet pending and undecided an appeal wherein he is seeking a new trial (U.S. v. Brennan, Court of Appeals, 7th Circuit, Dkt. #75-1955).